No. 16,349

In the

United States Court of Appeals

For the Ninth Circuit

MARY C. HUDSON, as Administratrix of the Estate of HERBERT A. HUDSON, Deceased,
Appellant,

vs.

TRANSOCEAN AIR LINES, a Corporation.
Appellee.

Brief for Appellee

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Preliminary Statement

The instant appeal is by Libelant from the decree of the Court below, granting the motion of Respondent Transocean Air Lines, Inc., (hereinafter referred to as "Transocean") for summary judgment.

The motion was made upon the ground that the pleadings and a Stipulation of Facts filed by the parties demonstrated that upon the basis of undisputed facts Transocean was entitled to judgment as a matter of law (Tr. 38-41).

The basic allegations of the pleadings are as follows: The instant action was commenced by Mary C. Hudson, Administratrix of the Estate of Herbert A. Hudson, Deceased, in the United States District Court and was sought to be founded upon the Death on the High Seas Act (Libel, Paragraph X, Tr. 6). The Libel (in Paragraph VII) alleged that on July 12, 1953, decedent Herbert A. Hudson was employed by Respondent Transocean aboard a certain airplane owned and operated by Transocean and while said airplane was in flight between Guam and the United States "and while said Herbert A. Hudson was *within the course and scope of his employment* with Respondent Transocean * * *" (emphasis added), the plane crashed upon the high seas, killing the decedent (Tr. 5). The Libel then generally alleged negligence on the part of Transocean (and others) and sought damages for and on behalf of Mary C. Hudson, Christine Anne Hudson and Lori Lee Hudson, as the decedent's surviving widow and children (Libel, Paragraphs XVI and XVII, Tr. 8).

Transocean's Answer to the Libel, after denying negligence, set up, among others, the following two affirmative defenses:

(1) that the death of decedent Hudson was an industrial accident subject to and governed by the provisions of the California Workmen's Compensation Act, that the remedy afforded by said Act provided the sole and exclusive remedy against the employer, Transocean, and barred the action (Answer of Transocean, Paragraph XV, Tr. 12); and

(2) that Libelant, following the death of decedent Hudson, had filed an application with the Industrial Accident Commission of the State of California for death benefits under the California Workmen's Compensation Act, and had secured an award against Transocean under that Act, which award was thereafter, upon petition of Libelant, com-

muted and paid to Libelant in a lump sum; that by reason of said facts, the action was barred (Answer, Paragraphs XVI-XVIII, Tr. 13-14).

The basic facts upon which Appellee's motion for summary judgment was made and granted are undisputed, and are set forth in the Stipulation of Facts (Tr. 18-34). That Stipulation shows the following: Transocean was and is a California corporation, with its principal headquarters at Oakland, California. At all times relevant decedent Hudson was a resident of the State of California (Tr. 18). Decedent Hudson was first employed by Transocean in 1950 in Oakland, California, and thereafter, save for intermittent furloughs, was employed as pilot or co-pilot on airplanes operated by Transocean flying out of Oakland, California (Tr. 18-19). At and prior to the time of Hudson's death a Collective Bargaining Agreement was in effect between Transocean and the Air Carrier Pilots Association (Non-Scheduled) International, Section 11 of which provided in part as follows:

> "(a) *It is agreed that the provisions of the California State Compensation Law shall be applicable to all pilots and co-pilots covered by this Agreement* provided that if the Longshoremen's and Harbor Worker's Act or any compensation law is found to be applicable, such law shall apply in lieu thereof * * *" (Tr. 19-20, emphasis added.)

Transocean had "secured" the compensation rights of its employees under the California Workmen's Compensation Act by a policy of workmen's compensation insurance which was in full force and effect at the time of the death of the decedent Hudson (Tr. 20). Following Hudson's death in the crash of a DC-6 (a land-based airplane) over the Pacific, Libelant, represented by independent counsel, filed an application for death benefits with the Industrial Accident Com-

mission of California and, after a hearing before said Commission, secured an award on December 29, 1953. This award was thereafter, on Libelant's application, paid to Libelant in a lump sum on or about May 18, 1955 (Tr. 21-22).

The instant action was then filed, less than two months thereafter, on July 7, 1955.

The Relevant Statutes

The relevant statutes are as follows:

(1) The Death on the High Seas Act (March 30, 1920, c. 111, Sections 1-7, 41 Stat. 537, 46 U.S.C.A. Sections 761-767):

Section 1:

> "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued."
>
> * * * * * * *

Section 7:

> "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone."

(2) The California Workmen's Compensation Act (cited as Sections in the California Labor Code):

Section 3600:

"Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as provided in section 3706, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur: * * *"

Section 3601:

"Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in section 3706, the exclusive remedy against the employer for the injury or death."

Section 3706:

"If any employer fails to secure the payment of compensation, any injured employee or his dependents may proceed against such employer by filing an application for compensation with the commission, and, in addition, may bring an action at law against such employer for damages, as if this divison did not apply."

Section 5305:

"The commission has jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this State in those cases where the injured employee is a resident of this State at the time of the injury and the contract of hire was made in this State. Any such employee or his dependents shall be entitled to the compensation or death benefits provided by this division."

The Issues in This Case

In this case the issues are:

(1) In the case of the death of an airline employee

killed in the course of his employment in the crash of an airliner on the high seas, do the provisions of the California Workmen's Compensation Act preclude an action for wrongful death against the employer under the Federal Death on the High Seas Act?

(2) In view of the language of the Death on the High Seas Act, may a claim be asserted under that Act against an airline employer for the death of an airline employee, where the employer would *not* have been liable "if death had not ensued"?

(3) Is the present action barred by the doctrine of election of remedies?

The Nature of Appellant's Contention: In Essence, It Is That Application of the California Workmen's Compensation Act to the Death of an Airline Employee Killed in the Course of His Employment During a Flight Over the Ocean Is Unconstitutional.

The argument of Appellant's Opening Brief can be summarized as follows: Certain passenger cases have held that the Death on the High Seas Act applies to death claims arising from accidents occurring during airline flights on or over oceans. In view of such rulings, the application of the California State Workmen's Compensation Act to such an accident (even though such application was originally made at Libelant's own instance and request) violates the United States Constitution.

Appellant concedes (at page 7 of her Opening Brief) that precisely the same issue was determined, adversely to Appellant, in *King v. Pan American World Airways,* 1958, 166 Fed. Supp. 136, in an opinion by District Judge Goodman, but argues that the *King* case was incorrectly decided, and spends most of her Brief seeking to distinguish the authorities therein relied on.

We agree that the very issue posed here was decided in the *King* case, after full consideration of the same kinds

of arguments made here by Appellant. In his opinion, Judge Goodman considered two questions: (1) was there a Constitutional bar to the application of the California Workmen's Compensation Act?, and (2) was there a statutory bar?, and held both questions must be answered in the negative. We consider Judge Goodman's opinion so well-reasoned and persuasive that we have set it out in Appendix A to this Brief.

In this Brief we propose: (1) to demonstrate that the airplane cases cited by Appellant are not in point; (2) to set forth the terms of the California Workmen's Compensation Act and the general rules of law governing rights and remedies of airline employees against their employers for industrial injuries (including death); (3) to demonstrate that to apply, consistent with those general rules of law, the California Workmen's Compensation Act to airline industrial injuries while in flight over the ocean violates neither (a) the United States Constitution nor (b) the Federal Death on the High Seas Act; (4) to show that on any theory the Death on the High Seas Act is inapplicable in this case to Transocean since it is applicable only as to persons "which would have been liable if death had not ensued", and Transocean would not have been liable to Herbert Hudson if death had not ensued; (5) to show that even if it be assumed that initially Appellant might claim under the Death on the High Seas Act as well as the California Workmen's Compensation Act, her claim in this case is barred by the doctrine of election of remedies.

Appellant's Authorities Dealing With Airplane Crashes Are Neither Legally nor Factually in Point

Appellant cites (at page 6 of her Opening Brief) some four cases for the proposition that "It is clear that the act [the Death on the High Seas Act] applies to airplane acci-

dents as well as to shipboard accidents". These are *Trihey v. Transocean Air Lines, Inc.*, 1957, C.A. 9, 255 Fed. 2d 824; *D'Aleman v. Pan American World Airways*, 1958, C.A. 2, 259 Fed. 2d 493; *Noel v. Linea Aeropostal Venezolana*, 1956, U.S.D.C., S.D.N.Y., 154 Fed. Supp. 162; and *Wilson v. Transocean*, 1954, U.S.D.C., N.D. Cal., 121 Fed. Supp. 85. None of these cases, however, is factnally or legally in point as to the issues in this case.

The *Trihey* case was a *passenger* case brought under the Death on the High Seas Act. The trial court heard the evidence, found no negligence had been shown, and decided in favor of the defendant. The question on appeal was whether this finding was permissible under the evidence; the Court of Appeals held it was, and affirmed.

The *D'Aleman* case again was a *passenger* case, in which the complaint alleged the decedent had been so frightened by an incident that occurred in flight over the ocean that several days later, after reaching land, he died. The complaint had two counts, the first under the Death on the High Seas Act, and the second under the Virginia wrongful death act. On the first count, the trial court itself heard the case, found no negligence had been shown, and decided in favor of the defendant. The second count was tried to a jury, which likewise decided in favor of defendant. On appeal, the sole question as to the first count was whether it should have been tried to a jury, instead of to the court in admiralty. The appeal as to the second count concerned only alleged erroneous rulings on the admissibility of evidence. The Court of Appeals affirmed as to both counts, holding that the first count had properly been tried in admiralty to the court on the theory that the Death on the High Seas Act governed occurrences during flight over the ocean, as well as upon the ocean, and that actions thereunder must be brought in admiralty.

The *Noel* case was a *passenger* case, arising out of a fatal airplane crash in the Atlantic Ocean. The plaintiffs originally had filed an action based on the Death on the High Seas Act on the "law side" of the Federal Court; the court had dismissed this action, holding that any claim founded on such Act must (under the words of the statute) be brought on the admiralty side of the court. Plaintiffs then filed an amended complaint alleging the accident occurred in the air, and argued this allegation alleged a claim under the Warsaw Convention which might be brought on the "law side". In 154 Fed. Supp. 162, the District Court again granted a motion to dismiss, holding that the allegation of "such an elusive fact as whether a person died above, on, or in the sea" did not constitute a sufficient difference to depart from its prior ruling.

The *Wilson* case was a *passenger* case. That case held: (1) that the Federal Death on the High Seas Act superseded State wrongful death actions, and (2) that an action brought under the Federal Death on the High Seas Act must—under its terms—be brought on the admiralty side of the court.

Thus, none of these cases were *crew* cases; none of them involved the question of the effect of a State Workmen's Compensation Act; and nothing was said in any of them, even by dictum, concerning this question. Only one of them, the *Wilson* case, even involved in any way a State-Federal situation, namely, the effect of a State *wrongful death act;* the distinction between that situation and the instant case is clearly pointed out by the very author of the *Wilson* opinion, Judge Goodman, in his opinion in the *King* case (see Appendix A) and is discussed at pages 39-41 of this Brief.

Although Appellant chose not to cite it in her Opening Brief, we anticipate that Appellant will cite in closing the

case of *Fernandez v. Linea Aeropostal Venezolana,* U.S.D.C., S.D.N.Y., 1957, 156 Fed. Supp. 94 as a case holding that a claim for the death of an airline crew member may be asserted under the Death on the High Seas Act.

The *Fernandez* opinion was a ruling on a preliminary motion to dismiss. The case involved a claim under the Death on the High Seas Act for the death of a stewardess in an airplane crash at sea, and the court denied a motion to dismiss; at first glance, therefore, the case seems factually in point. The case is legally not in point at all, however, since it in no way dealt with or even considered the question whether such a remedy, if otherwise applicable, would be barred by a workmen's compensation statute. The only issue before the court was instead the completely different question, presented on a preliminary motion, whether the United States Death on the High Seas Act applied in the case of a *foreign* airplane, with a *foreign* owner and crew, where the accident occurred outside the United States. (It is to be noted that the defendant was a Venezuelan airline, Linea Aeropostal Venezolana, and presumably so was the crew; the deceased stewardess in question was named Elvia V. Varela and her personal representatives were named Fernandez and Varela.) The District Judge held the United States Act *did* apply (a rather doubtful result in view of *Lauritzen v. Larsen,* 1953, 345 U.S. 571, 97 L.Ed 1254). Quite possibly the reason the effect of a workmen's compensation act remedy was neither posed nor considered is that Venezuela has no such act applicable with respect to such accidents.

Thus, none of the airplane cases cited by Appellant deal with the effect of a workmen's compensation act in a crew case and they are relevant only for the general proposition that in the case of an airline crash while in flight over the ocean *passenger* claims may be brought under the Federal

Death on the High Seas Act. (It is perhaps of some significance that application of this Act to airlines, even in passenger cases, is, so to speak, the product of "necessity". It has never seriously been contended that Congress, in enacting that Act (on March 30, 1920) had in mind airplanes or airplane flights over the ocean. The courts, however, have strained to find that Act applicable in such cases due to the well-known difficulties in the way of finding any State wrongful death statute applicable,[1] and the fact that no other Federal wrongful death statute could possibly be construed to apply. The courts have therefore been confronted with the choice of either holding the Death on the High Seas Act applicable, or else holding that, whatever the facts of the particular case, the heirs of a deceased passenger are out of court for lack of any applicable statute whatever.)

The California Workmen's Compensation Act: Its Extraterritorial Jurisdiction and Exclusive Remedy Provisions

The California Workmen's Compensation Act is contained in Sections 3201 through 6002 of the California Labor Code. It applies to all injuries (including death) arising out of an employee's employment (Labor Code Section 3600), both where the injury occurs within the State of California, and also where the injury occurs outside the territorial boundaries of the State of California, if the contract of employment was entered into in California (Labor Code Section 5305).[2] As the Court is aware, such extraterritorial coverage is common, even customary, in State Workmen's Compensation Acts. Such extraterritorial jurisdiction has been

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1. See, for example, *The Middlesex*, U.S.D.C., D. Mass. 1916, 253 Fed. 142.

2. Set forth at page 5 of this Brief. (Labor Code Section 3600.5 was not then in effect being first enacted in 1955, subsequent to the date of the instant accident on July 12, 1953.)

uniformly sustained on the basis of a State's legitimate interest in protecting employees regularly employed within the State and their families from the consequences of industrial accidents. *Alaska Packers v. Industrial Accident Commission,* 1935, 294 U.S. 532, 79 L. Ed. 1044.[3] As the Court is undoubtedly aware, thousands of American employees (many of whom were hired in California) now work in foreign countries, Arabia, Iran, India, South America and the like, on various construction and oil projects; these, it is understood by all, are protected as to industrial injuries by the applicable State Workmen's Compensation Act (very

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3. The language used by the United States Supreme Court in the case of *Cardillo v. Liberty Mutual Insurance Co.,* 1947, 330 U.S. 469, 91 L.Ed. 1028, sustaining application of the extraterritorial jurisdiction provisions of the District of Columbia workmen's compensation act, is very much in point. In rejecting a challenge to these provisions, the Court said:

> "We hold that the jurisdictional objection is without merit in light of these facts. Nothing in the history, the purpose or the language of the Act warrants any limitation which would preclude its application to this case * * *
>
> "Nor does any statutory policy suggest itself to justify the proposed exception. A prime purpose of the Act is to provide residents of the District of Columbia with a practical and expeditious remedy for their industrial accidents *and to place on District of Columbia employers a limited and determinate liability.* See Bradford Electric Light Co. v. Clapper, 286 US 145, 159, 76 L. Ed. 1026, 1035, 52 S Ct 571, 82 ALR 696. The District is relatively quite small in area; many employers carrying on business in the District assign some employees to do work outside the geographical boundaries, especially in nearby Virginia and Maryland areas. When such employees reside in the District and are injured while performing those outside assignments, they come within the intent and design of the statute to the same extent as those whose work and injuries occur solely within the District. *In other words, the District's legitimate interest in providing adequate workmen's compensation measures for its residents does not turn on the fortuitous circumstance of the place of their work or injury.* Nor does it vary with the amount or percentage of work performed within the District. Rather it depends upon some substantial connection between the District and the particular employee-employer relationship, a connection which is present in this case." (Emphasis added, 330 U.S. at 475-476.)

often that of California) rather than by Arabian or other "local" law.

Under the California Workmen's Compensation Act the employer is required to "secure" its employees' compensation rights by effecting compensation insurance with an insurance carrier (California Labor Code Section 3706).[4] Where the conditions and requirements of the Workmen's Compensation Act are present, and provided that the employer has complied with Section 3706 as stated above, the remedies against the employer for injury to or death of an employee are, by the express terms of the Act, made exclusive. The statutory language is found in Labor Code Section 3601 which reads as follows:

> "Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in Section 3706, the exclusive remedy against the employer for the injury or death."

As is well known, the Legislature, in enacting the California Workmen's Compensation Act, both extended and contracted the rights of employees against their employer. A comprehensive system of compensation for industrial injuries was provided, without any requirement of proof of fault; on the other hand, all "common law" rights of action by the employee against the employer for fault were expressly abrogated. Each of these two features of the Act is vital to it; each complements the other. Save for the single case where the employer, in violation of law, fails to "secure" compensation for its employees by effecting compensation insurance, the employer, in exchange for imposition of the obligation to pay compensation under the Act, is relieved from any other claims or causes of

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4. Which Transocean did. See Stipulation of Facts, Paragraph (5) (Tr. 20).

action by or on behalf of the employee. The exclusive remedy provision of the Act is thus a key and integral part of the statutory scheme; to hold that the exclusive remedy feature of the California Workmen's Compensation Act is inapplicable to a given situation is to hold that the Act in its entirety is inapplicable.

The Legal Background of the Law of Airline Industrial Injuries: Congress Has Left the Provision and Regulation of Remedies for Airline Industrial Injuries Wholly to the Respective States. When an Airline Industrial Accident Occurs, the Workmen's Compensation Act of the State of Employment Governs and Controls Over and Against the Wrongful Death Law of the Place of the Accident.

To present the present issue in its proper legal setting, some background concerning the rights and remedies of airline employees against their employers for industrial injuries (including death) is necessary.

There are two fundamental legal propositions of significance here:

(1) There is *no* applicable Federal remedy for industrial injuries of airline employees, either of the Workmen's Compensation or the F.E.L.A. Act kind;

(2) The applicable *State* Workmen's Compensation remedies do apply, and provide and regulate the remedies of airline employees against their employers with respect to industrial injuries.

It is common knowledge that nowadays commercial airliners fly all over the world, and that the typical trip covers a great distance. As for trips within the United States, almost every flight of a modern passenger airliner crosses one or more State boundaries. Hundreds of flights a week likewise take place between the continental United States and Europe, Asia, Africa and South America. These flights

pass over both land and ocean, but are always from a land airport to a land airport (save in the almost vanishing instance of "flying boats").

Due to the interstate and foreign nature of such airplane flights, it is clear, as a theoretical matter, that Congress *could* exercise jurisdiction, under the Constitution, to enact a Federal compensation act applicable to airline employees, comparable to the specific Federal laws enacted as to railroad workers, seamen, longshoremen, and others. It is equally clear, however, as a matter of actual practice, that Congress has seen fit *not* to exercise its potential jurisdiction over airline employees, but has instead left to the States, and solely to the States, the question of the respective rights and remedies of airline employees and their employers for industrial injuries. This is clear, both as a matter of common knowledge and also of authority. Thus, in *Spelar, Administratrix v. American Overseas Air Lines, Inc.*, U.S.D.C., S.D.N.Y., 1947, 80 Fed. Supp. 344, involving a wrongful death action for the death of a flight engineer killed in an airplane crash in Newfoundland, the court said (at page 347):

> "* * * no rule of liability or method of compensation has been established by Congress with respect to personal injuries sustained by employees of airplane carriers engaged in interstate or foreign commerce."

In view of the importance of air transportation to our modern life, and the specific recognition given the airline industry by Congress in various respects (such as Congressional investigation into overlapping use of the national air lanes by the military services and civilian airlines, and the application of the Railway Labor Act to labor disputes in the airline industry) the complete and utter silence of Congress upon the subject of airline employer-employee

rights and remedies in respect to industrial injuries, can only be deemed intentional and deliberate.

In approaching the issue in the present case, therefore, we must bear in mind that, with respect to the *typical* industrial airline injury occurring on land, whether within or without the United States, Congress has provided *no* Federal remedy but has intentionally and knowingly left the field to State regulation and State regulation alone.[5]

The second fundamental proposition to observe, in the field of airline industrial injuries, is that the applicable Workmen's Compensation Act has uniformly been held to govern and control, as against the *lex delicti,* the tort law of the place of the injury which would otherwise normally apply. The applicable Workmen's Compensation Act has been held to govern because that is the law with relation to which the parties contracted, and that is the law which affords at once a speedy and certain remedy to the injured worker (or, in the case of death, to his family) and thus protects both the interest of the worker and the State. The cases are uniform to this effect, whether the crash causing the injury occurs within the United States or upon overseas territory.

First, as to crashes within the United States: In *Willingham v. Eastern Air Lines,* C.A. 2, 1952, 199 Fed. (2d) 623, suit was brought in New York for the death of an airplane pilot killed in a crash in Maryland. The widow had claimed and received compensation under the Georgia

5. The fact that Congress has intentionally and knowingly left this area to the States is illustrated by the fact that both in the 84th and 85th Congresses bills were introduced in the House of Representatives, the effect of which would have been to specifically make airline employees subject to the Federal Employers Liability Act and these bills failed even to get out of committee. See H.R. 4831 introduced in the 84th Congress, and H.R. 1044 introduced in the 85th Congress, both by Congressman Zelenko.

Workmen's Compensation Act. The court held that the Georgia Workmen's Compensation Act applied and that the wrongful death action based upon Maryland law was barred by the exclusive remedy provisions of the Georgia Act.

In *Severson v. Hanford Tri-State Air Line, Inc.,* C.A. 8, 1939, 105 Fed. (2d) 622, the plaintiff was a co-pilot on a commercial airplane flying between Minnesota and Illinois, and was injured in a crash in *Wisconsin,* allegedly due to his employer's negligence. He brought a common law action for damages based on negligence against the employer. The trial court directed a verdict for defendant on the ground that plaintiff's sole remedy was under the *Minnesota* Workmen's Compensation Act, and the Circuit Court of Appeals affirmed, stating:

> "It is conceded that plaintiff suffered an accidental injury arising out of and in the course of his employment. The Workmen's Compensation Acts of the various states were enacted for the purpose of requiring industry to bear a part of the burden occasioned by accidental injuries to its employees, when such injuries arose out of and in the course of employment. It is important to determine the location of the industry. If the industry in which plaintiff was employed was in fact located in Minnesota, he was entitled to the protection of the Minnesota Workmen's Compensation Law, even though his injuries were received in another state, if the work he was doing was a part of the industry being carried on in the State of Minnesota, or was incident thereto." (Pages 624-625)
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> * * * * * * *
>
> "We think it clear that the plaintiff was employed in a business or industry localized in Minnesota, and *hence his right to compensation for injuries received during his employment must be determined exclusively under the Workmen's Compensation Act of that State.*

He could not, therefore, maintain a common law action for damages predicated upon negligence. The judgment appealed from is affirmed." (Emphasis added, page 625.)

See also *Duskin v. Pennsylvania Central Air Lines,* C.A. 6, 1948, 167 Fed. (2d) 727.

The same rule applies to injuries or death resulting from crashes occurring in foreign countries. Thus, in *Spelar, Administratrix v. American Overseas Air Lines, Inc.,* U.S.D.C., S.D.N.Y., 1947, 80 Fed. Supp. 344, involving a wrongful death action brought for the death of a flight engineer killed in an airplane crash in Newfoundland, the court held that the New York Compensation Act was applicable, and that the wrongful death action otherwise available under Newfoundland law was barred by the exclusive remedy provisions of the New York Compensation Act. In *Urda v. Pan American Airways,* C.A. 5, 1954, 211 Fed. (2d) 713, a personal injury action was brought by an airline steward for injuries received in a crash in Brazil. The court held that the Florida Workmen's Compensation Act governed, and that that Act barred any actions based on Brazilian law.

It is important to note that these cases sustaining the paramount and controlling nature of the applicable State Workmen's Compensation Act were decided, *not* upon the theory that there was *no* local wrongful death act (that is, local to the place of the crash) or that the local wrongful death statute was for some reason intrinsically defective and invalid, nor even upon the theory that such local statutes would not apply to foreign airplanes merely passing over the local territory. These cases were instead decided upon the basis that where *both* the applicable Workmen's Compensation Act and the local wrongful death act

would otherwise apply, it was the former which governed and controlled, and which afforded the sole and exclusive remedy; that is, the Workmen's Compensation Act excluded the operation of the *otherwise applicable* wrongful death act.[6]

To sum up, then, in stating the legal background for the present case, we believe it is clear beyond dispute that the paramount and exclusive nature of the applicable Workmen's Compensation Act *would* control:

(1) If the airplane crash had occurred in California;

(2) If the airplane crash had occurred in any other State of the United States;

(3) If the airplane crash had occurred in any foreign country.

Under any of the above situations, if an airline employee were injured, he would receive a State Workmen's Compensation remedy, and that only; if he were killed, his family would receive death benefits under the State Workmen's Compensation Act, and those benefits only.

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6. The preferred status of workmen's compensation remedies over tort remedies in general is exemplified by the two recent United States Supreme Court decisions of *Feres v. United States,* 1950, 340 U.S. 135, 95 L.Ed. 152, and *Johansen v. United States,* 1952, 343 U.S. 427, 96 L.Ed 1051. The *Feres* case held that a soldier's sole remedy against the United States for personal injuries lay in the compensation-type remedies available to servicemen, and that resort could not be had to the Federal Tort Claims Act. The *Johansen* case held that the Federal Employees Compensation Act was the exclusive remedy for injuries sustained by a civilian member of the crew of an Army transport and that resort could not be had to the Public Vessels Act for a tort recovery. In each case the result was reached although there was *no* specific "exclusive remedy" provision and the language of the "tort" statute relied upon was general in nature, and literally applicable.

See also to the same effect the recent Court of Appeals (D.C.) case of *Aubrey v. U. S.*, 1958, 254 Fed. (2d) 768, an opinion by Justice Reed, holding that the District of Columbia workmen's compensation act precluded an employee of a Navy officer's open mess from suing the United States under the Federal Tort Claims Act.

The question presented in the District Court in this case was: What was the result if an airline crash occurred—not over land—but over or upon the ocean:—

(1) Did the same law (the applicable State Workmen's Compensation law) govern *which would govern in the case of any other accident;* or

(2) Did an entirely new and different law all of a sudden apply, with entirely different legal rules both as to the determination of liability and of damages?

It was the contention of Transocean that both under the statutory and case law, and as a matter of common sense and practicality, the same law of industrial injuries that would apply to any other airline accident applied to an airline accident occurring on or over the high seas; it was the contention of Appellant (notwithstanding the fact that promptly following the accident she had invoked the jurisdiction of the California Industrial Accident Commission, secured an award, and then taken pains to accelerate its payment in a lump sum) that that law did not apply at all, and instead, purely due to the fortuitous location of the scene of the accident, an entirely new and different law governed.

The District Court rejected this latter contention and held the case governed by the same law governing any other airline industrial injury.

The Same Principle Which Governs Elsewhere, the Paramount Nature and Exclusive Effect of the Workmen's Compensation Remedy, Applies in the Instant Case. The Situation Is Not Changed by the Fact a Federal Remedy Might Exist in the Absence of Any State Compensation Remedy.

In their Opening Brief, Appellant's counsel quote Sections 1 and 2 of the Federal Death on the High Seas Act (46 U.S.C.A. Sections 761-767), cite the cases previously

discussed which sanctioned *passenger* claims arising out of airline crashes at sea to be brought under that Act, and argue Appellant is thereby entitled to prevail.

The issue, however, is *not* whether the Death on the High Seas Act applies to *passengers,* nor even whether it would apply to airline flight personnel in the *absence* of an applicable State Workmen's Compensation Act; the issue instead is whether the Death on the High Seas Act is applicable to industrial injuries or deaths of such personnel which *are* covered by a State Workmen's Compensation Act.

At first blush, the thought comes to mind that the existence of *any* Federal remedy will control and, if necessary, supersede any otherwise applicable State statute, on the theory that this result is compelled by the Supremacy Clause of the Constitution. This, however, is not correct. (We of course concede that a valid Act of Congress which *intends* to supplant State legislation dealing with the same subject does in fact supplant and supersede such State legislation, if such intention is either expressly or impliedly made clear; as will be shown hereafter, however, this is not the situation here.)

This is made clear by a line of cases which the United States Supreme Court decided in the 1920's.

The first of these, *Grant Smith-Porter Ship Co. v. Rohde,* 1922, 257 U.S. 469, 66 L. Ed. 321, dealt with a workman injured while at work on a partially completed ship lying at dock in a river near Portland, Oregon. The Oregon Workmen's Compensation Law (applicable unless specifically waived, which had not been done) purported to apply to shipbuilding. The workman sued the employer for negligence in the Federal Admiralty Court. The Ninth Circuit Court of Appeals certified to the United States Supreme Court two questions: (1) whether the general admiralty jurisdiction of the Federal Court would normally extend to

the accident in question; and (2) whether such admiralty right of action would be abrogated by the State Workmen's Compensation Act. The Supreme Court discussed the facts and then stated:

> "Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential * * *
>
> "Construing the first question as meaning to inquire whether the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a state, *we answer yes.*
>
> "Assuming that the second question presents the inquiry whether, in the circumstances stated, *the exclusive features of the Oregon Workmen's Compensation Act would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist, we also answer, yes.*" (257 U.S. at pages 477-478; emphasis added.)

Millers' Indemnity Underwriters v. Braud, 1926, 270 U.S. 59, 70 L. Ed. 470, dealt with the accidental death of a diver employed by a shipbuilding company, killed while submerged from a floating barge. The State Court sustained a compensation award under the Workmen's Compensation Law of Texas. (Coverage under the Texas Workmen's Compensation Act was compulsory, not elective.) The employers and its compensation carrier appealed, insisting:

> "* * * that the claim arose out of a maritime tort; that the rights and obligations of the parties were fixed by the maritime law; and that the State had no power to change these by statute or otherwise." (270 U.S. at 63)

The United States Supreme Court discussed its prior decision in the *Rohde* case and then said:

"In the cause now under consideration the record discloses facts sufficient to show a maritime tort *to which the general admiralty jurisdiction would extend save for the provisions of the state Compensation Act;* but the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law. *The act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist.*" (270 U.S. at pages 64-65; emphasis added.)

In *Alaska Packers Association v. Industrial Accident Commission,* 1928, 276 U.S. 467, 72 L. Ed. 656, a workman for a fish cannery in Alaska (who had been hired in California) was injured while endeavoring to push into navigable water a stranded fishing boat. An Industrial Accident Commission award was challenged:

"* * * upon the sole ground that when injured he was doing maritime work under a maritime contract and that the rights and liabilities of the parties must be determined by applying the general rules of maritime law, and not otherwise." (276 U.S. at page 469.)

The Court, in reply, said:

"Whether in any possible view the circumstances disclose a cause within the admiralty jurisdiction, we need not stop to determine. *Even if an affirmative answer be assumed,* the petitioner must fail. Peterson was not employed merely to work on the bark or the fishing boat. He also undertook to perform services as directed on land in connection with the canning operations. When injured certainly he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law." (276 U.S. at page 469; emphasis added.)

See also *Alaska Packers Assn. v. Marshall,* 1938, C.A. 9, 95 Fed. 2d 279, an opinion of this Court, following the above cases, and sustaining a State compensation remedy as applied to an employment with definite maritime aspects.

There are two significant propositions to be drawn from the above cases:

(1) The Court did *not* hold that an admiralty remedy would normally *not* apply to the fact situations existing in these cases; on the contrary, in each case it held that (absent a State Workmen's Compensation Act) the general admiralty jurisdiction *would* apply.

(2) The Court did *not* hold that a rule of absolute uniformity was compulsory within the admiralty jurisdiction, and that variation created by State law was not permissible; on the contrary, it held that State law might apply (and *would* be applied by the court) save where it would (in the words of the court in the *Alaska Packers* case, at page 469) "interfere with the *essential* uniformity of the *general maritime* law." (The same thought was expressed in the *Rohde* case (at page 477) where the court stated that local law could not "*materially* affect any rules of the *sea* whose uniformity is *essential*" and in the *Braud* case (at page 64) that local law was invalid only where it would work "*material* prejudice" to a "*characteristic* feature" of the "*general maritime* law".

We believe these cases furnish a decisive answer to any contention by counsel for Appellant that the existence (in the *absence* of an applicable State Compensation Act) of a Federal remedy immediately and at once acts to exclude and render ineffective a State Compensation Act that is applicable. Such was certainly not the holding of the United States Supreme Court in the cited cases; on the contrary, they held in each case that the *State* Compensation Act was

effective to exclude *the otherwise applicable Federal* remedy.

We believe the instant case falls well within the rule of the above cases.[7] Actually, as discussed below, the instant case is a much stronger one for the application of a State workmen's compensation act than the cited cases, since the latter concededly involved employments with definite maritime aspects, whereas the airline employment in the instant case was completely non-maritime.

Application of a State Workmen's Compensation Act to the Death of an Airline Employee in an Airplane Crash Over the Ocean Is Not Unconstitutional as in Violation of the Jensen Doctrine.

As noted, the basic contention of Appellant's counsel is that a State workmen's compensation act "cannot be constitutionally applied" (Appellant's Brief, p. 12) to the facts of this case because "exclusive control of all admiralty matters" is reserved to Federal law and Federal courts (Appellant's Brief, page 11). Although Appellant does not choose to cite it by name, it seems apparent that Appellant is seeking to bring this case within the *Jensen* doctrine (*Southern Pacific Co. v. Jensen,* 1917, 244 U.S. 205, 61 L.Ed. 1086).

Since it appears Appellant seeks to rely upon this doctrine, we must discuss it. We wish to make clear at the outset, however, that in our opinion the *Jensen* doctrine is irrelevant and a false issue in this case for one simple but fundamental reason: that doctrine relates to the need for uniformity in certain basic aspects of *maritime* law, and

7. These cases, which have never been overruled or qualified, constitute the simplest and most drastic refutation of the assertion by Libelant's counsel that the Supreme Court has "jealously guarded the exclusive control of all Admiralty matters by Federal laws and Federal courts" (Libelant's Opening Brief, page 11) since the results reached therein were arrived at even though the employments involved admittedly had maritime as well as non-maritime aspects.

peculiarly to the need for uniformity in regulating rights between employers and employees in certain classic *maritime* employments, whereas this case is an *airline* case, dealing with an industrial injury to an employee in a *non-maritime* industry who performed *no maritime* work. If this point be firmly kept in mind in the following discussion, we believe the total inapplicability of the *Jensen* doctrine will be evident.

In citing a series of cases following the *Jensen* case, decided between 1920 and 1928, (and cited at the top of page 10 of Appellant's Opening Brief), which held certain State and Federal statutes unconstitutional *as applied to certain particular fact situations,* Appellant's counsel have slurred over the very basis and rationale of these decisions, namely, that they each dealt with certain historic maritime pursuits.

Certain traditional maritime employments have always been regulated by Admiralty law. The clearest situation, the regulation of the mutual rights and duties of seamen and their employers, is the classic subject of Admiralty law. Another clear situation is the employment of stevedores or longshoremen performing the work of loading or unloading ships, once done (and in some primitive ports still done) by seamen themselves.[8]

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8. The close relationship between the occupations of seamen and longshoremen is well described in *International Stevedoring Co. v. Haverty,* 1926, 372 U.S. 50, 71 L.Ed. 157, (decided before the enactment of the Federal Longshoremen's and Harbor Workers' Act) wherein Justice Holmes, in holding that longshoremen were "seamen" within the meaning of the Jones Act, said:

> "It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen'. But words are flexible. The work upon which the plaintiff was engaged was a *maritime service formerly rendered by the ship's crew.* [Citation] We cannot believe that Congress willingly would have allowed the protection to men *engaged upon the same maritime duties* to vary with the accident of their being employed by a stevedore

In the original *Jensen* case the Supreme Court held, 5 to 4, that the New York State Workmen's Compensation Act could not validly be applied to the death of a stevedore killed while unloading a ship. The majority opinion held that "the general maritime law" was part of our national law (244 U.S. at 215) and that State legislation was invalid if it "works material prejudice to the characteristic features of the general maritime law" (244 U.S. at 216). The Court conceded:

> "* * * it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. *That this may be done to some extent cannot be denied.*" (244 U.S. 216, emphasis added.)

but held that on the facts of the case before it, the employment was so maritime that the State compensation act was invalid, stating:

> "The work of a stevedore, in which the deceased was engaging, is *maritime* in its nature; his employment was a *maritime* contract; the injuries which he received were likewise *maritime;* and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction." (244 U.S. 217, emphasis added.)

Thus, in the *Jensen* case, and each of the subsequent cases cited by Appellant's counsel, wherein the Supreme Court under the leadership of Justice McReynolds held certain occupational pursuits subject to exclusive control by Admiralty, the opinion of the Court emphasized the "maritime" nature of the employment and its connection with the classic maritime pursuits.

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rather than by the ship . . . In this statute 'seamen' is to be taken to include stevedores *employed in maritime work on navigable waters*, as the plaintiff was, whatever it might mean in laws of a different kind.'' (372 U.S. at page 52, emphasis added.)

In *Knickerbocker Ice Co. v. Stewart,* 1920, 253 U.S. 149, 64 L.Ed. 834 (another 5 to 4 case), the Court stated the decedent's death occurred "while employed by Knickerbocker Ice Co. as bargeman and *doing business of a maritime nature*" (253 U.S. at 155, emphasis added) and held the particular act there in question invalid because seeking to sanction State compensation remedies "for injuries suffered by employees *engaged in maritime work*" (253 U.S. at 163-164, emphasis added).

In *Great Lakes Dredge and Dock Co. v. Kierejewski,* 1923, 261 U.S. 470, 67 L.Ed. 756, involving the death of a shipyard worker killed while working on a floating vessel, the Court said "while performing *maritime* service to a complete *vessel afloat,* he came to his death upon *navigable waters* * * *" (261 U.S. at 480, emphasis added).

In *Washington v. Dawson & Co.,* 1924, 264 U.S. 219, 68 L.Ed. 646, two cases were dealt with jointly; one presented the question "whether one engaged in the business of *stevedoring,* whose employees work *only on board ships in the navigable waters* of Puget Sound, can be compelled to contribute to the accident fund provided for by the Workmen's Compensation Act of Washington", while the other dealt with jurisdiction over "the death of a workman killed *while actually engaged at maritime work, under maritime contract, upon a vessel* moored at her dock in San Francisco Bay and discharging her cargo" (264 U.S., pages 221-222, emphasis added.)

In *Gonsalves v. Morse Dry Dock and Repair Co.,* 266 U.S. 171, 69 L.Ed. 228 (which so far as appears did not involve the question of a State Compensation Act at all) the Supreme Court held that a personal injury was subject to Admiralty law where it occurred to a shipyard worker working on shell plates of a ship tied up in a floating dock,

the Court holding in a brief opinion a ship "supported by a structure floating on navigable waters" was not "on land."

In *Robins Dry Dock and Repair Co. v. Dahl*, 1925, 266 U.S. 449, 69 L.Ed. 372, the Court held that the rights of a shipyard worker injured while "doing repair work on the *Steamer* El Occident, *then lying in navigable waters* at Brooklyn" were governed by Admiralty, not State law.

That the basis of the *Jensen* doctrine is the presence of an employment so *essentially maritime* that it should be regulated only by the Federal Government is made clear by examining the cases cited at pages 21-25 of this Brief. These cases are, of course, all consistent with *Jensen* (as indeed is to be expected since they are unanimous opinions, written by Justice McReynolds, the author of the *Jensen* doctrine). Thus in *Grant Smith-Porter Ship Co. v. Rohde*, discussed above at page 21, the Court emphasized the non-maritime aspects of the employment in question in the following words:

> "The contract for constructing 'The Ahala' was *nonmaritime*, and although the incompleted structure upon which the accident occurred was lying in navigable waters, *neither Rohde's general employment, nor his activities at the time*, had any direct relation to navigation or commerce * * * *And as both parties had accepted and proceeded under the statute by making payments to the industrial accident fund, it cannot properly be said that they consciously contracted with each other in contemplation of the general system of maritime law*. Union Fish Co. vs. Erickson, 248 U.S. 308, 63 L.ed. 261, 39 Sup. Ct. Rep. 112. Under such circumstances regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, by a local rule, would not necessarily work material prejudice to any characteristic feature of the general *maritime* law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations."

* * * * * * *

"This conclusion accords with Southern P. Co. vs. Jensen * * * and Knickerbocker Ice Co. vs. Stewart * * *. In each of them *the employment or contract was maritime in nature* and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity. *Here the parties contracted with reference to the state statute;*" * * * (257 U.S. at pages 473-474, emphasis added.)

In *Millers Indemnity Underwriters v. Braud,* discussed above at page 22, involving the death of a diver, the Court cited and relied upon its prior decision in the *Rohde* case, noting that it had there "stress[ed] the point that the parties were clearly and *consciously* within the terms of the [State Workmen's Compensation] statute *and did not in fact suppose they were contracting with reference to the general system of maritime law* * * *" (270 U.S. at 64, emphasis added).

In *Alaska Packers Assn. v. Industrial Accident Commission* case, discussed above at page 23, the Court held that the contention that the employment of a fisherman whose duties also embraced work on land in connection with canning operations was to be governed exclusively by maritime law was "incompatible with" the doctrine of the *Rohde* and *Millers Indemnity* cases (276 U.S. at 469).

The emphasis which the Supreme Court gave to the contract and understanding of the parties is peculiarly relevant in this case, where the applicable Collective Bargaining Agreement specifically provided for California workmen's compensation (Tr. 19-20).

Appellant's counsel seek to distinguish these cases as "ship-shore cases" and argue that all cases involving "com-

merce and navigation" under the *Jensen* doctrine fall within the exclusive "subject matter of admiralty". Appellant's counsel then argue that the instant case clearly involved "commerce and navigation".

This contention is essentially a play on words. It is clear that in one sense airline flights constitute "commerce and navigation", but it is equally clear they do not do so within any sense comprehended by the *Jensen* doctrine. The difference is illuminated by one simple example: airline flights over the Continental United States constitute "commerce and navigation" in the *aviation sense,* but no one would contend that they are "subject matter of Admiralty". The verbal formula of Appellant's counsel can be made to stand up only by systematically omitting the essential adjective "*maritime*" in every mention of the *Jensen* doctrine. Once we remember that the *Jensen* doctrine has to do with *maritime* law and *maritime* navigation and *maritime* commerce, and that (to borrow the words of Judge Goodman in the *King* case) an airline crew is "employed in a *non-maritime industry* and performed *no maritime work*" (168 F. Supp. at page 139), Appellant's contention stands revealed for what it is—essentially a play on words.

We believe, therefore, there is no occasion in this case to go into such questions as the current status of the *Jensen* doctrine (which at present is argued by many to have vitality primarily as a doctrine defining the jurisdictional "line" presumably contemplated by Congress in enacting the Federal Longshoremen's Act) because, for the reasons given above, we believe there is no possible conflict between the *Jensen* doctrine and the ruling of the court below in the instant case.

Here the expectation of both parties to the employment (as exemplified in the Collective Bargaining Agreement, see Tr. 19-20) is aptly described in the words of the Supreme Court in the *Rohde* case:

> "Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential * * *" (257 U.S. at page 477)

The employment here involved was simply not "maritime" nor connected directly nor indirectly with navigation or seaborne commerce, the traditional subjects of the "general maritime law". There is no present and existing "uniformity" or even similarity (certainly not an "*essential*" uniformity) between either the legal or factual positions of the traditional maritime employments, and the employment of the airline flight personnel here involved.

If there were in fact an "identity", or even a "family relationship" between traditional maritime employments, on the one hand, and airline employment on the other, Congress would undoubtedly have *assumed* jurisdiction over the field of industrial injuries of airline employees, and have passed a law assimilating the rights and remedies of such employees for industrial injuries to those of maritime workers and seamen, such as the Federal Longshoremen's Act or the Jones Act. This Congress has not done. This intentional failure to act is powerful evidence that, certainly in the eyes of Congress, there is no "essential uniformity" in legal treatment to be preserved between these two widely differing industries, the most ancient form of transportation on the one hand, and the most modern on the other, operating in two completely different media.

The employment, duties, skills, working conditions, interests, problems and general situation of airline crews flying across land and ocean are completely dissimilar and unrelated to those of seamen engaged in traditional maritime pursuits. True "uniformity" could not be created, let

alone preserved, by treating airline crews like seamen. The true uniformity and identity which in fact exists is that between airline flights over oceans and airline flights over land; the uniformity in legal treatment that should exist is between those two situations. To make the respective rights and duties as between the crew members of a commercial airliner and their employer radically vary depending on whether a particular flight is over land or over ocean (which might even vary upon the particular choice of routes between the same two points or, even more anomalously, in the case of an "ocean" flight (which is in fact always a flight over both land and ocean) would vary depending upon whether trouble developed over the over-land or over-ocean portion of the flight) would be not to preserve and protect an existing "uniformity," but would rather completely destroy uniformity and instead weave a crazy-quilt pattern into the law of industrial injuries of the airline industry.[9]

It would create only confusion and arbitrary and unexpected consequences for both airline employees and employers to hold that, while Workmen's Compensation governed in the case of all industrial injuries arising on or over land, in the case of injuries or death occurring upon or over the water Workmen's Compensation was inapplicable and recovery for industrial injuries in such latter (and exactly equivalent) situation could be had only upon

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9. The language which Appellant's counsel quotes (at page 9 of Appellant's Opening Brief) from the opinion of this Court in *Alaska Packers Assn. v. Marshall,* 1938, 95 Fed. 2d 279, in our opinion supports Appellee's position, rather than Appellant's. In that language this Court rejected any result "where * * * the relationship of seamen to owner would vary, maybe half a dozen times, in the course of a voyage." A similar arbitrary variation in the mutual rights and duties between an airline crew and its employer depending upon where an accident chanced to occur, a result which this Court found manifestly undesirable, is the result which Appellant's position compels, and is a result prevented by ours.

proof of fault. Where no fault of the employer was involved (and, in view of the high standard of care used in the aviation industry and the various natural hazards of air transportation, this would usually be the case)[10] there would be no recovery at all, either for an injured employee or, in the event of death, for his dependents. Even if it be assumed that fault on the part of the employer was present, in the nature of the case this would be difficult or impossible for the claimant to establish and there again recovery would be defeated. Even where negligence could be shown and a recovery secured, this would occur only after prolonged litigation. Prompt payment of the medical and indemnity benefits provided under a Workmen's Compensation Act would be conspicuously absent. So anomalous a result, with such unexpected consequences, should be avoided if it is possible to do so.

Commercial airliners have been flying across the ocean for some twenty to twenty-five years now, since the mid-1930's. The crews of such airplanes and their employers during this period have operated upon the assumption that during such flights they were covered and protected by the applicable State compensation act of their State of employment. We submit that Appellant's counsel have presented no legal or practical reasons to overturn this situation and at this late date to change the rules.

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10. In this connection the air cases cited in Appellant's Opening Brief are very much in point. Both the *Trihey* case and the *D'Aleman* case affirmed trial court rulings in favor of the *defendants*, on the ground *that no negligence had been shown*. In addition, any plaintiff would face the barrier to recovery discussed on pages 44-49 of this Brief.

The Federal Death on the High Seas Act Does Not Displace State Workmen's Compensation. The Intention of Congress Was Merely to Remedy a Defect in the Common Law and Not to Displace or Affect State Remedies, Particularly State Workmen's Compensation Acts. This Is Shown by: (a) the Language of the Act, (b) the Legislative History of the Act, (c) the Cases.

Appellant's Opening Brief also inferentially argues that State workmen's compensation acts are displaced in this case by statute, by the mere existence of the Federal Death on the High Seas Act. We have previously demonstrated that the mere existence of an otherwise applicable Federal remedy does not in itself exclude and render ineffective a State compensation act on facts such as here involved. However, Appellant argues that in this case Congress has in the Death on the High Seas Act "prescribed an exact measure" of jurisdiction and thus inferentially argues that it was the intent of Congress to displace State compensation remedies in any area within the territorial coverage of the Act. The question thus presented, therefore, is whether or not it was the intent of Congress, in enacting the Death on the High Seas Act, to displace and supersede State workmen's compensation remedies which would otherwise govern.

The intent of Congress may be sought by examining: (a) the language of the Act, (b) the legislative history of the Act, and (c) cases construing the Act.

(a) The Language of the Act Suggests No Intent to Displace State Compensation Remedies.

It is surprising that Appellant, in stressing that the language of the Act ("* * * beyond a marine league from the shore") has prescribed an "exact measure" of jurisdiction chooses to ignore the fact that the Act not only contains no language expressly purporting to supersede State work-

men's compensation remedies, but instead does the exact reverse. Section 7 of the Act (46 U.S.C.A. Section 767) reads as follows:

> "*Exceptions from Operation of Chapter.*
>
> "The provisions of any State statute giving or regulating rights of action or remedies for death *shall not be affected* by this chapter * * *" (Emphasis added.)

The California Workmen's Compensation Act and its exclusive remedy provision are "provisions" of a "State statute * * * regulating * * * remedies for death * * *". To deny it effect would be to "affect" it to the extreme degree; it would be in effect to *repeal* it.

The language is so clear that we believe, if we wished, we could well stop here.

(b) The Legislative History Does Not Indicate Any Intention to Displace State Workmen's Compensation Acts.

The Death on the High Seas Act was passed by the 66th Congress and became law on March 30, 1920. The bill was debated in the House of Representatives on March 17, 1920; the report of the debate appears in 59 Congressional Record, pages 4482-4487. A study of that debate, we submit, reveals two propositions very clearly:

(1) The sole purpose of the bill was to remedy a defect of the common law, whereby a defendant who had negligently injured another, and was liable for said injuries if the victim lived, escaped liability altogether if the victim died. On land, this defect had been remedied by statute by most State legislatures, but the common law rule had not been changed in admiralty. This anomaly in admiralty law was vivid in the mind of the Congress, in view of the litigation arising out of the then-recent sinking of the Titanic. The purpose of the Act was to remove this anomaly of the common law and permit recovery in the event of death

under the same circumstances which would have governed had the decedent survived. It seems safe to say that had there been no such anomaly of the common law, there would never have been a Death on the High Seas Act.

(2) It was the intention of Congress not to displace or disturb State remedies. This was made very clear by the circumstances which led to the offering and adoption of an amendment by Congressman Mann. As originally proposed, the bill *would* by implication have superseded State remedies. Congressman Mann specifically objected to this and proposed an amendment deleting the language which would have led to this result. The amendment, although opposed, was adopted.

Pertinent portions of the legislative history, which clearly demonstrate the above two propositions, appear in Appendix B to this Brief.

With respect to the question whether the Act was intended to supersede State workmen's compensation remedies, it is pertinent to note that the Congress which enacted the Act in 1920 was friendly, not hostile, to the maximum possible application of State workmen's compensation acts. As appears in the Congressional debate quoted in Appendix B, the Act had been under consideration for several years or more before its enactment by the 66th Congress. The case of *Southern Pacific Co. v. Jensen* (referred to at page 25 of this Brief above) holding (in a situation where Congress had not specifically spoken) that State compensation acts could not validly apply to traditional maritime employments insofar as uniformity was essential, was decided on May 21, 1917. On October 6, 1917, the 65th Congress passed a law amending the Judiciary Act so as to specifically provide there was preserved "to claimants the rights and remedies under the workmen's compensation law of any State". (Act of October 6, 1917, Chapter 97, 40

Stat. at L. 395.) This was the posture of the law on March 30, 1920, when the Death on the High Seas Act became law. Thereafter, when the United States Supreme Court subsequently held (5-4, reversing the New York State Courts) that this law was unconstitutional insofar as it was held to permit a New York State workmen's compensation law to be applied to a bargeman who was injured while "doing work of a maritime nature" *Knickerbocker Ice Co. v. Stewart*, 1920, 253 U.S. 149, 64 L. Ed. 834, the 67th Congress promptly passed the Act of June 10, 1922, Chapter 216, 42 Stat. at L., 634, which again sought to authorize jurisdiction of the State workmen's compensation laws to the maximum possible extent. (This Act was subsequently held unconstitutional, as applied to stevedores "whose employees work only on board ships in the navigable waters of Puget sound" (264 U.S. 221) in *Washington v. Dawson & Co.*, 1924, 264 U.S. 219, 68 L. Ed. 646.)

We submit that these Acts of the 65th and 67th Congresses (held invalid as to particular fact situations upon grounds not relevant to our case, see discussion at pages 25-34 of this Brief) constitute persuasive evidence as to the general attitude of the 66th Congress with respect to State workmen's compensation acts, at the time it considered and enacted the Death on the High Seas Act.

We think the foregoing makes it overwhelmingly evident that Congress, in enacting that Act, had neither a specific nor a general intent to displace or in any way affect workmen's compensation acts, but rather that both the general and specific intent of Congress was to the contrary.

(c) Neither the Holdings nor the Reasoning of the Decided Cases Indicate That the Death on the High Seas Act Superseded State Compensation Remedies.

Appellant's chief reliance seems placed on *Wilson v. Transocean Air Lines*, U.S.D.C., N.D. Cal., 1954, 121 Fed.

Supp. 85. In view of such reliance, it is noteworthy that the author of the *Wilson* opinion, Judge Louis Goodman, found that ruling totally inapplicable in the instant case.

In the *Wilson* case Judge Goodman expressed the opinion (121 Fed. Supp. at pages 90-91) that the enactment of the Federal Death on the High Seas Act superseded the operation of State *wrongful death acts* upon the high seas. (This statement was, under the facts posed in the *Wilson* case, arguably dictum, since, as appears in footnote 32 on page 93 in the opinion, the California Wrongful Death statute (upon which plaintiff relied) did not in any event purport to extend to the high seas or go beyond the territorial boundaries of California; and it was upon this basis that the defendant in the *Wilson* case argued it was inapplicable.) Although considering the contrary intendments of the Mann amendment, Judge Goodman arrived at his conclusion in view of various considerations, including the possible conflict arising from two statutes, State and federal, of the same general scope and character occupying the same area, and the desirability of avoiding constitutional questions which might otherwise arise under the *Jensen* doctrine.

It is very clear that the *Wilson* opinion dealt only with the effect of the Act upon State *wrongful death acts*. Judge Goodman's language was carefully limited in this regard, as indicated by the following extracts:

> "So, while the Mann amendment provides a strong argument that the Death on the High Seas Act does not supersede *state wrongful death statutes* on the high seas, the argument is not so strong but what it is overcome by other considerations."
>
> * * * * * * *
>
> "Moreover, any attempt to apply a *state wrongful death statute* to a death occurring on the high seas,

would, today, raise a serious constitutional question." (Page 90)

* * * * * * *

"Finally, in all the years that have elapsed since the passage of the Death on the High Seas Act, it appears to have been the unanimous view of both the cases and the commentators that the Act supersedes the *state wrongful death statutes* as to actions for death occurring on the high seas." (Page 91, emphasis added.)

Not only the language but the reasoning likewise is limited to the case of State wrongful death acts. The arguments Judge Goodman cites in this connection are persuasive. It is not unreasonable to hold that a valid Congressional enactment upon *the very same subject* demonstrates a Congressional intent to supersede comparable State statutes. The Death on the High Seas Act is cast in the form of a typical wrongful death statute, and is couched in the most general terms, appropriate to such a statute. It is therefore not unreasonable to hold that State *wrongful death statutes* (couched in the same general terms, addressed to the same situation, with the same general solution) are superseded by the Act to the extent they purport to operate within the same area. (Moreover, State wrongful death statutes in general do not purport or intend to apply outside the State's own boundaries. There is no legal nor logical reason to apply State wrongful death acts outside a State's boundaries, in contrast to State workmen's compensation acts, where extra-territorial jurisdiction *is* essential if their purposes are to be fulfilled. See pages 11-20 of this Brief.)

As noted by Judge Goodman in his opinion in the *King* case, none of the factors which suggest the Act supersedes State *wrongful death statutes* are relevant in the case of State *workmen's compensation acts,* particularly as to

workmen's compensation acts as applied to airline personnel flying over the high seas. The Death on the High Seas Act is not at all of the same type and character as the State compensation acts and is in no way directed at the specific problem (the regulation of the respective rights and remedies between airline employees and their employers) with which they deal. (The situation would, of course, be quite different were we considering an Act of Congress specifically regulating the respective rights and remedies of airline employees and their employers as to industrial injuries. The case would then resemble the situations presented by the F.E.L.A. Act and the Jones Act, where Congress has specifically dealt with the regulation of rights and remedies for industrial injuries in particular specified employments. As noted above, however, the Death on the High Seas Act was not framed at all with a view to regulating industrial injuries in a specific field of employment, but was merely to remove an anomaly in the general field of personal injury law.)

Likewise, as noted in the *King* opinion, and at pages 25-34 of this Brief, there is no possible conflict with the *Jensen* doctrine since airline personnel are *not* a traditional subject of maritime law, and to permit State workmen's compensation acts to apply to them would in no sense "interfere with the *essential* uniformity" of maritime law, since they are not a subject of maritime law to start with. Indeed, as Judge Goodman points out: "The decedent was employed in a *non-maritime* industry and performed *no maritime work*. Indeed the only aspect of this case which gives it any maritime flavor whatsoever is the locale of the accident." (166 Fed. Supp. at page 139.)

In short, as Judge Goodman held in the *King* case, the judgment in this case is in no way inconsistent with the

construction of the Act in *Wilson v. Transocean Airlines* and the cases following the *Wilson* case.

Moreover, it is interesting to note that Judge Denman, writing for the Court of Appeals for the Ninth Circuit in *Higa v. Transocean*, 1956, 230 Fed. 2d 780 (decided subsequent to the *Wilson* case) expressed the view that even State wrongful death acts were not superseded by the Act. In that case Judge Denman reviewed the legislative history and discussed the Mann amendment. (It will be recalled (see Appendix B) that the purpose of the amendment, in the words of its author, Congressman Mann, was "so that the Act will not take away any jurisdiction conferred now by the States.") Judge Denman noted trenchantly: "Congress agreed with Mann * * *" (230 Fed. (2d) at pages 782-783). (The actual holdings of the *Higa* and *Wilson* cases are of course consistent; the issue in each was whether a cause of action founded on the Death on the High Seas Act had to be brought in admiralty, and each case held that it did.

Thus whether the language of section 7 is to be read literally, as suggested by Judge Denman in the *Higa* case, or as subject to an implied exception as to State wrongful death acts by reason of constitutional questions otherwise created by the *Jensen* doctrine, as suggested in the *Wilson* case, this language must be given effect as to State workmen's compensation acts, at least insofar as they pertain to industrial accidents occurring in airline operations over the high seas, the contact of which with maritime matters is at most fortuitous and tangential.

It can thus be seen that any argument that the enactment of a "specific" act of Congress makes the situation of this case very different from that presented in the line of cases discussed at pages 21-26 of this Brief is completely without merit. That argument, when analyzed, must ultimately rest

on a contention as to the presumed intent of Congress. The intent of Congress, however, as manifested in the express language of the Act and its legislative history, particularly in the setting of the times and in the light of the purpose of the Act, is clearly to the contrary.

Appellant's Other Citations Discussed

Appellant's citation of *Reed v. Penn Ry. Co.,* 351 U.S. 502, 100 L.Ed. 1366, *Southern Pac. Co. v. Gileo,* 351 U.S. 493, 100 L.Ed. 1357, and *Senko v. LaCrosse Dredging Co.,* 352 U.S. 370, 1 L.Ed. 2d 404, seems wholly irrelevant in the present case. The *Reed* case and the *Gileo* case dealt with injuries to employees of *railroads* and concerned the proper construction of the 1939 Amendment to the *Federal Employers' Liability Act,* the meaning of which the Court ascertained in the conventional way from the language of the Amendment and the legislative intent reflected in the Senate report.

The *Senko* case dealt with the question whether a "deck hand" on a dredge usually at anchor in a river was a "member of a crew of a vessel" so as to be covered by the *Jones Act.* The Court held, 6 to 3, that sufficient evidence had been introduced to show that he was, in this connection noting that the duties of plaintiff's job would require him to take soundings and clean navigation lights if and when the dredge was in transit.[11]

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11. The Court also noted:

"The fact that the petitioner's injury occurred on land is not material. Admiralty jurisdiction and the coverage of the Jones Act depends only on a finding that the injured was 'an employee of the vessel, engaged in the course of his employment' at the time of his injury. Swanson v. Marra Bros., Inc. 328 US 1, 4, 90 L ed. 1045, 1047, 66 S Ct 869, citing O'Donnell v. Great Lakes Dredge & Dock Co., 318 US 36, 87 L ed 596, 63 S Ct 488." (1 L. Ed. 2d 408, 352 U.S. at 373)

The logic of the rule that seamen injured on land while on ship's business are covered by seamen's laws supports our position in this

In each of these three cases, of course, the Court was dealing with an Act of Congress specifically directed at regulating remedies for industrial injuries in a specified employment. It seems clear none of these cases has any bearing on the issues in the instant case.

On Any Theory the Liability Imposed by the Death on the High Seas Act Is a Purely Derivative Liability, and Requires for Its Imposition That the Defendant Be One "Which Would Have Been Liable if Death Had Not Ensued". Pan American Would Not Have Been Liable to John Elvins King if Death Had Not Ensued, and the Act Therefore Has No Application in This Case.

As noted above, we anticipate that Appellant's counsel will contend that, even though a non-statutory admiralty remedy might be superseded by a State compensation act, the contrary occurs where there is an express Federal statute and that that statute (omitting Section 7 thereof, which Appellant's counsel has sought to disregard), solely controls. We believe that the foregoing sections of this Brief sufficiently dispose of such contention. Even if our position in this regard is not accepted, however, there is another equally sufficient answer.

It is to be noted that the Death on the High Seas Act does *not* provide that there is to be a cause of action in *every* case where a death occurs on the high seas due to negligence; instead the Act provides that with respect to a death caused by wrongful act, negligence or default on the high seas, a cause of action is granted "against the vessel,

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case, rather than Appellant's. It is eminently sensible to say that a seaman ashore on ship's business is still a seaman, whose rights and obligations should be determined by seamen's laws; it likewise makes eminently good sense to hold that an airline crew, flying over an ocean, is still an airline crew, and that their rights and obligations should be governed by the laws normally applicable to airline crews.

person or corporation which would have been liable *if death had not ensued.*" The cause of action created lies only where the decedent might himself have recovered had he survived.[12]

The liability thus created is a derivative liability to remedy the gap or omission in the common law whereby a defendant, liable for personal injuries caused by his negligence, nevertheless escaped liability because the plaintiff died.

It is clear from the legislative history previously discussed (see the introduction of the discussion of the bill by

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12. That this is a basic principle in this area of the law clearly appears in the leading text book, *Tiffany, Death by Wrongful Act,* 2nd Edition, 1913, published only seven years before the Death on the High Seas Act was enacted. Section 63 of that text reads as follows:

> "Sec. 63. *Act or Neglect Must Be Such that Party Injured Might Have Maintained Action.*
>
> "An essential limitation upon the words 'wrongful act, neglect, or default' is created by the provision that they must be such as would have entitled the party injured to maintain an action therefor. This provision makes it a *condition* to the maintenance of the statutory action that an action might have been maintained by the party injured for the bodily injury. The condition has reference, of course, not to the loss or injury sustained by him, but to the circumstances under which the bodily injury arose, and to the nature of the wrongful act, neglect or default; and, although this condition has not been expressed in California, Idaho, Kentucky, and Utah, *no case has been found in which it has not been implied.*
>
> "*A preliminary question arises,* therefore, in *every* action for death, namely, was the act, neglect, or default complained of such that if it had simply caused bodily injury, without causing death, the party injured might have maintained an action?" (Emphasis added, pages 132-133.)

The present vitality of this condition is illustrated by a quotation from the *Fernandez* case (discussed at page 10 above of this Brief) with respect to the very Act here in question:

> "The Death on the High Seas Act recognizes this distinction for it does not create a cause of action or grant a right of recovery for death in every situation but only against those defendants 'which would have been liable if death had not ensued' ". (156 Fed. Supp. 94 at 97)

the House Committee chairman, quoted in Appendix B) that the purpose of the Act was solely to remedy this anomaly of the common law, and to bring the maritime law into conformity with modern notions in this respect. (Virtually all States had by this time enacted wrongful death statutes.) The purpose was to prevent a tort feasor, otherwise liable by reason of his wrongful act, neglect or default, from escaping liability because the personal injuries inflicted proved fatal. This was achieved by, in substance, providing that the liability would continue to exist notwithstanding the death; the "person or corporation which would have been liable if death had not ensued" would still be liable. That the liability under the Act was intended to be merely the same liability which would have existed by reason of a defendant's wrongful act, neglect or default in the event death had not ensued, no more, no less, is shown by Section 5 of the Act, (46 U.S.C.A., Section 765) which provides as follows:

> "If a person die as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title *during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default,* the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title." (Emphasis added.)

The parallel structure is obvious. If an action is pending for personal injuries in respect of a wrongful act, neglect or default, and the plaintiff dies, the personal representative of the plaintiff is simply substituted and the suit may proceed under the Death on the High Seas Act. No problem is created because the liability being enforced is the same.

There is not even a hint, either in the legislative history or in the text of the Act, of any intention to impose liability for death where there would have been no liability for injury, or to disrupt and interfere with the scheme of State workmen's compensation acts (See 59 Congressional Record pp. 4482-4487).

It is clear that had the decedent Hudson suffered only personal injuries from the accident in question he could *not* have sued Transocean on any theory of alleged negligence or wrongful conduct; his sole right would have been to compensation, payable, not on the basis of anyone's fault, but by reason of the industrial nature of the injury.

Even if in such a situation the decedent Hudson would have possessed a non-statutory admiralty remedy in the *absence* of an applicable State workmen's compensation act, the situation would be identical with those presented in the cases discussed at pages 21-26 of this Brief; that is, the exclusive nature of the State workmen's compensation act would control under the doctrine of the *Rohde* case. (In such a situation, involving personal injuries only, Libelant would be unable to try to distinguish those cases by citing the existence of an "express" Act of Congress, for there is none.)

As pointed out above, we believe that the situation of air line flight personnel is *sui generis,* and not properly to be assimilated with or even related to that of seamen and others following traditional maritime pursuits. Even if the situation of air line personnel were in general assimilated to that of seamen, however, this would not help Appellant, for the reason that, (until the enactment of the *Jones Act* in 1920, specially creating a remedy) the traditional admiralty rule was that a seaman, could *not* sue his employer for injuries allegedly due to the employer's negli-

gence, his sole remedies being maintenance and cure and the warranty of seaworthiness. Thus, in the leading case of *The Osceola,* 1903, 189 U.S. 158, 47 L. Ed. 760, a Court of Appeals certified to the United States Supreme Court the question whether the owners of a vessel were liable to a member of the crew for personal injuries sustained by him by reason of the master's negligent conduct in the navigation and management of the vessel. The Supreme Court, in a unanimous opinion, answered the certified question: "No", and held a seaman's remedies were limited to maintenance and cure and the warranty of seaworthiness, and that a seaman was *not* allowed to recover for the negligence of the master or any member of the crew.

This doctrine was re-enunciated in *Chelentis v. Luckenbach Steamship Co.,* 1918, 247 U.S. 372, 62 L. Ed. 1171, where the Court affirmed a nonsuit in a seaman's action for personal injuries allegedly due to negligence. The Court cited *The Osceola* and quoted with approval the language of the Court of Appeals below that

> "by virtue of the inherent nature of the seaman's contract the defendant's negligence and the plaintiff's contributory negligence were totally immaterial considerations in this case." (Pages 379-380)

It was for the express purpose of giving seamen a remedy against their employer for the latter's negligence that the Jones Act was passed in 1920 and that act (46 U.S.C.A., Section 688) is expressly limited to "*seamen.*"

It is of course clear that flight personnel of commercial air liners, even when flying over oceans, are not "seamen" and that the Jones Act is inapplicable to them. See *Stickrod et al v. Pan American Airways Co.,* 1941 U.S. Av. Reports 69, 1 Av. Cases 942.

If air line personnel, therefore, are assimilated to seamen, this means that before 1920 they had no remedy against their employer for personal injuries due to the latter's negligence and, being *unaffected* by the Jones Act, *that situation remains true right down to the present date.*

This reasoning, we confess, may seem artificial, but it merely underscores the artificiality of trying to assimilate air line personnel to, or to treat them as comparable with, maritime workers. It is our belief that the only remedy for personal injuries arising from an industrial accident to air line personnel flying over an ocean is the applicable State Workmen's Compensation Act; that an air line employer is not liable on any negligence theory; that it is therefore not a "person or corporation which would have been liable *if death had not ensued*"; and that in the case of death, therefore, the Death on the High Seas Act does not apply.

Even if the Court Were to Hold That Appellant, Notwithstanding the California Workmen's Compensation Act, May Claim Under the Death on the High Seas Act, Appellant's Claim in This Case Is Barred by the Doctrine of Election of Remedies.

Appellant's Brief (at pages 9-11) refers several times to the "twilight zone" cases and the case of *Davis v. Department of Labor and Industries,* 1942, 317 U.S. 249, 87 L.Ed. 246. The "twilight zone" doctrine, as this Court knows, was evolved by the Supreme Court in 1942 in the *Davis* case and lays down a "practical rule" to resolve certain close cases which can arise as to whether an industrial injury in a quasi-maritime activity is governed by the Federal Longshoremen's Act, on the one hand, or by a State workmen's compensation act, on the other. The effect of the "twilight zone" doctrine is, in marginal Longshoremen's Act-State workmen's compensation cases, to confirm jurisdiction in whichever administrative body first assumes jurisdiction

with the result that in effect, though not in theory, in such close cases there is initially concurring jurisdiction.

We do not believe either the "twilight zone" doctrine or the *Davis* case is at all pertinent in the instant case. First, this is not a Longshoremen's Act case. Second, we believe it clear that the sole remedy afforded in an airline industrial injury is State workmen's compensation since Congress clearly has enacted no compensation act of any type specifically directed at regulating airline industrial injuries. (See pages 14-16 of this Brief.) (The Longshoremen's Act-State workmen's compensation act question is thus quite different from any Death on the High Seas Act-State workmen's compensation act question. In the former situation, unlike the latter, there is a specific Federal Act specifically directed at providing a *compensation* remedy against employers for *industrial injuries* in a specified area of employment.)

If, however, contrary to our position, this Court were to decide that the situation here *is* comparable to that presented in the "twilight zone" cases, we believe it is still clear that Appellant cannot recover in this case because she is barred by the doctrine of election of remedies.

As set forth in the Stipulation of Facts, Appellant, represented by independent counsel, filed an application for California workmen's compensation benefits, secured an award for the same after a hearing,[13] and then upon further

13. The instant case, it is to be noted, is thus unlike certain cases (*Mass Bonding & Ins. Co. v. Lawson*, 5 Cir. 1945, 149 F.2d 853; *Gahagan Construction Corp. v. Armao*, 1 Cir. 1948, 165 F.2d 301; *Kibadeauz v. Standard Dredging Co.*, 5 Cir., 81 F.2d 670, *cert. den.*) cited in *Western Boat Building Co. v. O'Leary*, discussed hereafter in the text, which held merely that there had been no estoppel or election *in particular fact situations* (where the claimant had either merely received voluntary payment of compensation without any official application therefor or determination by a Commission, or had not been represented by counsel).

application secured the commutation and payment of said award in a lump sum amount (Tr. 21-22).

In effect, Appellant, having a choice between seeking a definite and assured remedy, without proof of fault, or of seeking a possibly larger recovery, available only after litigation and proof of fault (with the possibility of *no recovery at all*) elected first to capture *and eat* the "bird in the hand", and then to pursue the "bird in the bush". We contend that by electing to claim and recover under the compensation act, Appellant has precluded herself from now asserting the new and different claim made in the present action. She has made an election of remedies and is bound by that election.

18 *Am. Jur., Election of Remedies,* Section 3, Page 129, reads as follows:

> "Sec. 3. Definition and Nature.
> Election is simply what the term imports—a choice shown by an overt act between two or more inconsistent rights, either of which may be asserted at the will of the chooser alone. An election of remedies may be defined as the choosing between two or more different and co-existing modes of procedure and relief allowed by law on the same state of facts. The doctrine is applicable where an aggrieved party has two remedies by which he may enforce inconsistent rights growing out of the same transaction and, being cognizant of his legal rights and of such facts as will enable him to make an intelligent choice, brings his action by one of the methods. *Under such circumstances, the law says he shall not thereafter adopt the alternate remedy, for a suitor cannot pursue a remedy which predicates his case upon one theory of right and thereafter seek a remedy inconsistent with such prior proceeding.*" (Emphasis added.)

Remedies under the Death on the High Seas Act and the California Workmen's Compensation Act are intrinsically

inconsistent in law, in that the latter Act by its express terms bars any other remedy. Appellant, by electing the latter remedy, cannot now assert the former remedy.

We appreciate that this Court in *Western Boat Building Co. v. O'Leary,* C.A. 9, 1952, 198 F. 2d 409, a Longshoremen's Act-State Workmen's Compensation Act case, rejected just such a contention, relying primarily upon *Newport News Shipbuilding and Dry Dock Co. v. O'Hearne,* 1951, C.A. 4, 192 F. 2d 968. The latter case held on the facts there before it, there had been no election by prior resort to the State Commission because "as it now appears, the State Commission had no jurisdiction in the premises" (192 Fed. (2d) at 971.

We submit the *O'Leary* and *Newport News* cases must be reconsidered in the light of the recent Supreme Court case of *Hahn v. Ross Island Sand and Gravel Co.,* Jan. 12, 1959, ... U.S. ....., 3 L. Ed. 292. The Supreme Court in that case construed its previous decision in *Davis v. Department of Labor and Industries* as giving a "twilight zone" waterfront worker in effect *"an election* to recover compensation under either the Longshoremen's Act *or* the Workmen's Compensation Law of the State in which the injury occurred" (p. 292, emphasis added). The Court therefore held (reversing the Oregon State courts below) that the plaintiff Hahn (whose injury, the Supreme Court said, plainly "occurred in the 'twilight zone' ") might prosecute a common law suit for negligence under Oregon State law (permissible under Oregon State law, notwithstanding the existence of an Oregon Workmen's Compensation Act, because the employer had failed or refused to comply with the State Compensation Act). Both the language and the holding of this case make it clear that the Supreme Court views this situation as a true "election" situation. Thus, the Court held the plaintiff could prosecute his State negligence action. Can it be

supposed, if the plaintiff in the *Hahn* case now prosecutes his action to a conclusion, and recovers or fails to recover on the merits, that he may (notwithstanding his initial resort to the State courts, whose jurisdiction he maintained, against their initial rulings, by ultimate resort to the United States Supreme Court) thereafter take the position that the State courts were "without jurisdiction" and make claim and recover under the Federal Longshoremen's Act? We submit it would be incredible for any such result to be sanctioned by the courts, and that such result would not be sanctioned by the United States Supreme Court. It seems clear that the *Hahn* plaintiff would be held bound by his election.[14] The language and holding of the Supreme Court in the *Hahn* case clearly implies a view of the Longshoremen's Act-State Workmen's Compensation Act situation totally inconsistent with the rationale of the *Newport News* case, upon which this Court in *O'Leary* relied. To the extent, therefore, that the instant case is viewed as in any way analogous to the "twilight zone" situation, (which, we repeat, we do *not* believe it to be) Appellant here too must be held bound by the election of remedies which she made.

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14. Likewise, the Supreme Court's action in the *Baskin* case points unerringly in the same direction. In that case, a "twilight zone" situation, the California courts (in 89 Cal. App. 2d 632, 201 Pac. 2d 549) sustained a denial of jurisdiction under the State Compensation Act on the ground the case fell within the Longshoremen's Act coverage. That ruling was reversed by the United States Supreme Court in *Baskin v. Industrial Accident Comm.*, 1949, 338 U.S. 854, 94 L.Ed. 523. The California court thereupon reversed its position and sustained State jurisdiction in 97 Cal. App. 2d 257, 217 Pac. 2d 733 (1950), which judgment was affirmed in *Kaiser Co. Inc. v. Baskin*, 1950, 340 U.S. 886, 95 L.Ed 643. Can it be supposed that the United States Supreme Court would have permitted Baskin, after thus securing a State compensation remedy, to thereafter make claim under the Federal Longshoremen's Act, on the theory that the State Commission "as it now appears" all along "had no jurisdiction in the premises"?

Conclusion

The foregoing has demonstrated that:

(1) At the time of the accident in question the decedent Hudson was acting within the course and scope of his employment with Appellee Transocean; that Appellant, acting through independent counsel, filed an application for death benefits under the California Workmen's Compensation Act and, after a hearing, the California Industrial Accident Commission assumed jurisdiction and granted a death benefit award to Appellant and against Appellee Transocean and its workmen's compensation insurance carrier with respect to Hudson's death; that Appellant thereafter secured commutation of said award and a lump sum payment in full; that the California Workmen's Compensation Act expressly bars any other remedy;

(2) With respect to all other industrial accidents (including deaths) arising out of air line operations the applicable State Workmen's Compensation Act governs and controls the rights of the employees and employer; that under the applicable Supreme Court decisions, such State Workmen's Compensation Acts may exclude Federal Admiralty remedies otherwise available, where to do so would not materially interfere with the "essential uniformity" of maritime law; that to apply State Workmen's Compensation Acts with respect to air line industrial accidents occurring while airplanes are in flight over the ocean would not materially interfere with any essential uniformity of admiralty law, since airline employment is factually and legally totally unlike the traditional maritime pursuits;

(3) That such application of State workmen's compensation acts with respect to airline industrial accidents occurring while airplanes are in flight over the ocean does not violate the United States Constitution under the *Jensen*

doctrine, since that doctrine relates to maritime law and maritime situations, whereas airline employment is wholly non-maritime;

(4) The existence of the Federal Death on the High Seas Act does not change the situation, since the intention of Congress, as expressed in the language of the Act and its legislative history, was not to displace State remedies; that in any event, the Act would at most supersede only State wrongful death acts, and not workmen's compensation acts;

(5) On any theory the Death on the High Seas Act is inapplicable to the present situation, since that Act merely preserves rights of action which the decedent would have had against persons "if death had not ensued"; that the decedent Hudson would have had no right of action against his employer, Transocean, for personal injuries, since the same would have been barred by workmen's compensation and since no admiralty recovery is granted an employee against his employer for the latter's negligence, save in the case of the Jones Act, which covers only "seamen"; that the Death on the High Seas Act is therefore inapplicable;

(6) Even if it be assumed that Appellant initially might claim under the Federal Death on the High Seas Act as well as the California State Workmen's Compensation Act, her election to claim and recover under the latter Act constitutes a binding election of remedies which precludes subsequent resort to a Death on the High Seas Act remedy.

In view of the foregoing facts and legal authorities, we submit the District Court correctly decided that Transocean

was entitled to judgment as a matter of law on the admitted facts. That judgment was correct, and should be affirmed.

Dated at San Francisco, California, on June 18, 1959.

Respectfully submitted,

STEINHART, GOLDBERG, FEIGENBAUM
& LADAR
JOHN J. GOLDBERG
NEIL E. FALCONER

(Appendices Follow)

Appendix A

Opinion of District Judge Louis Goodman in the Case of Virginia J. King, Administratrix, v. Pan American World Airways, 1958, U.S.D.C., N.D. Cal. S.D., 166 Fed. Supp. 136:

Goodman, District Judge.

This cause presents the novel question whether the California Workmen's Compensation Act precludes an action for wrongful death under the Federal Death on the High Seas Act by the administratrix of the estate of an airline employee who in the course of his employment was killed in the crash of an airliner on the high seas.

The stipulated facts show that the decedent entered the employ of respondent Pan American World Airways, a New York corporation, at San Francisco, California, on October 12, 1942. He was steadily employed thereafter by Pan American and since December, 1947 was continuously based at San Francisco. On May 1, 1957, the decedent was assigned the position of Flight Service Supervisor. The duties of this position required him to spend the majority of his working time at the San Francisco base and the remaining working time in in-flight supervision and observation of pursers, stewards and stewardesses employed on Pan American aircraft flying in and out of San Francisco. On November 8, 1957, he was in the course of his employment aboard a Pan American airliner which crashed upon the high seas between the United States and Hawaii. Although it does not appear whether he was killed in the air or upon impact with the water, it is stipulated that he did not survive the crash.

On December 2, 1957, Pan American and its compensation insurance carrier filed an application with the California Industrial Accident Commission to determine their liability for death benefit and burial expenses under the

California Workmen's Compensation Act. At the hearing of this application on February 20, 1958, the decedent's wife, the libelant herein, appeared specially and contested the jurisdiction of the Industrial Accident Commission. On March 31, 1958, the Commission made an order finding that it had jurisdiction and awarded decedent's wife and minor children a death benefit totaling $15,000.00. Meanwhile, on February 3, 1958, decedent's wife filed this libel under the Death on the High Seas Act[1] in her capacity as administratrix of decedent's estate.

It is established that a suit may be brought in admiralty under the Death on the High Seas Act for a death resulting from the crash of an aircraft upon the high seas. Wilson vs. Transocean Air Lines, D.C.N.D. Cal. 1954, 121 F. Supp. 85. There is no doubt that, in the absence of the California Workmen's Compensation Act, the libelant could maintain this action under the Death on the High Seas Act. But respondent contends that the California Workmen's Compensation Act has been properly applied to this case and affords the exclusive remedy against it for decedent's death.

The California Workmen's Compensation Act expressly provides compensation for the death, outside the State, of an employee hired or regularly employed in the State. West's Ann. California Labor Code § 3600.5. The right to recover such compensation is declared by the Act to be the exclusive remedy against the employer. West's Ann. California Labor Code § 3601.

The United States Supreme Court has upheld the power of the California legislature to provide compensation to California employees for industrial accidents occurring in other States of the Union and in the Territories. Alaska Packers Association vs. Industrial Accident Commission,

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[1]41 Stat. 537, 46 USCA §§ 761-768.

1935, 294 U.S. 532, 55 S.Ct. 518, 79 L. Ed. 1044. Does this power also extend to the High Seas?

In Southern Pacific Co. vs. Jensen, 1917, 244 U.S. 205, 37 S.Ct. 524, 61 L. Ed. 1086 the Supreme Court held that the New York Workmen's Compensation Law, § 1 et seq. could not be applied to a stevedore killed aboard a vessel in New York Harbor. Such an application of a state compensation law, the Court stated, would destroy the uniformity in respect to maritime matters which was intended to be preserved by the Constitutional provisions granting the Congress paramount power to fix and determine the maritime law. The Jensen rule was qualified by later cases in which the Supreme Court held that State compensation acts might be applied to injuries or deaths within the admiralty jurisdiction provided the application of the State Acts did not work material prejudice to any characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate impacts.

In Grant Smith-Porter Ship Co. v. Rohde, 1922, 257 U.S. 469, 42 S.Ct. 157, 66 L. Ed. 321, a carpenter was injured while working on a partially completed vessel lying at a dock in the Willamette River at Portland, Oregon. The Court held that his sole remedy lay under the Oregon Workmen's Compensation Act, ORS. 656.002 et seq., which abrogated the otherwise existing right to recover damages in an admiralty court. In Millers' Indemnity Underwriters vs. Braud, 1926, 270 U.S. 59, 46 S.Ct. 194, 70 L. Ed. 470, a diver was suffocated while submerged from a floating barge anchored in the navigable Sabine River in Texas. The Court ruled that the Texas Workmen's Compensation Law, Vernon's Ann. Civ. St. art. 8306 et seq., prescribed the only remedy for his death and that its exclusive features abro-

gated the right to resort to the Admiralty court which otherwise would exist.[2]

In Alaska Packers Association vs. Industrial Accident Commission, 1928, 276 U.S. 467, 48 S.Ct. 346, 72 L.Ed. 656, the Supreme Court sanctioned the application of the California Act to a cannery worker injured while attempting to push a stranded fishing boat off an Alaskan beach. The injured workman was not employed merely to work on the fishing boat, but also to perform services on land in connection with canning operations. The Court found that, assuming the injury to be within the admiralty jurisdiction, he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by State law would interfere with the essential uniformity of the general maritime law. Thereafter the Court of Appeals for this Circuit upheld the application of the California act to two similarly employed cannery workers who met death in the wreck of a fishing schooner at sea. Alaska Packers Association vs. Marshall, 9 Cir., 1938, 95 F.2d 279.

Through the years the courts have experienced considerable difficulty in determining whether or not a particular application of a State compensation law to a case within the admiralty jurisdiction unduly interferes with the essential uniformity of the general maritime law or works material prejudice to its characteristic features.[3] There has evolved no precise test for determining whether or not a State compensation act may constitutionally be exclusively applied to a death or injury within the admiralty jurisdic-

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[2]Apparently the Court had in mind a suit in admiralty asserting the right of action given by the State Wrongful Death Act, Vernon's Ann. Civ. St. art. 4671 et. seq., the death having occurred within the territorial waters of the State.

[3]For an account of these difficulties see Gilmore and Black "The Law of Admiralty" 333-354 (1957); Note, "Has the Jensen Case Been Jettisoned?" 2 Stanford Law Review 536 (1950).

tion. But, the present case clearly falls within the area where such application of a State compensation act is proper. The decedent was employed in a non-maritime industry and performed no maritime work. Indeed the only aspect of this case which gives it any maritime flavor whatsoever is the locale of the accident. It must be concluded that there is no Constitutional barrier to the application of the California Workmen's Compensation Act in this case.

There remains the question whether there is a statutory barrier. Libelant urges that the Congress intended the Death on the High Seas Act to afford the exclusive remedy for a death on the high seas. If this were the Congressional intent, the application of the California Workmen's Compensation Act is barred, since Congress possesses paramount power to legislate in respect to matters within the admiralty jurisdiction.

In Wilson vs. Transocean Airlines, D.C. 1954, 121 F. Supp. 85, this Court held that the Death on the High Seas Act superseded all State Wrongful Death Acts in respect to deaths occurring on the high seas. In a dictum in Higa vs. Transocean Air Lines, 9 Cir., 1955, 230 F.2d 780, 782-83, the Court of Appeals for this Circuit expressed a contrary view. We adhere to the decision in Wilson that the right to maintain a suit for wrongful death on the high seas accorded by the Death on the High Seas Act supersedes any state-given right of action for such a death.

But, the factors which, in Wilson, we found indicative of the Congressional intent that the Death on the High Seas Act should supersede the State Wrongful Death Statutes are not relevant to the State Compensation Acts. The Death on the High Seas Act and the State Wrongful Death Statutes afford a remedy for death upon a showing of fault; the State Compensation Acts grant relief for the death of a workman killed in the course of his employment on the

basis of his status as an employee. The Compensation Acts provide a certainty of relief unobtainable in a suit in admiralty. There is nothing in the legislative history of the Death on the High Seas Act to suggest that the Congress intended that the remedy given by the Act should displace any remedy afforded by a State Compensation Act for a death occurring on the high seas. It would not be reasonable to assume that the Congress had any purpose to deprive the dependents of an employee killed in the course of his employment of the unique protection which a State Compensation Act is competent to give them.

The Death on the High Seas Act was enacted to fill a void in the maritime law and provided an admiralty remedy for wrongful death where none had existed before. There is no indication that the Congress intended that this statutory remedy for death should have any different relation to the State Compensation Laws than the pre-existing non-statutory admiralty remedies for personal injury. Since the Supreme Court has ruled that State Compensation Acts, designed to afford an exclusive remedy to injured employees, abrogate the otherwise existing admiralty remedy for personal injuries in situations where the application of the state act does not interfere with the uniformity of the maritime law, it is reasonable to conclude that the Compensation Acts similarly abrogate the admiralty remedy for wrongful death accorded by the Death on the High Seas Act.

Respondent's motion for summary judgment in its favor is granted.

Appendix B

Extracts from the Discussion in the House of Representatives on March 17, 1920 on the Proposed Death on the High Seas Act (59 Congressional Record, Pages 4482-4485, March 17, 1920; emphasis added.):

Chairman Volstead began the discussion:

"Mr. Speaker, this legislation is an old friend that has been pending in Congress a great many years. It has been passed from time to time, sometimes in the House and sometimes in the Senate. The bill, if you will examine the report made upon it, *is intended to supply a defect which now exists under what was the common-law rule* as to actions affecting injuries that might be caused through the wrongful act or neglect of persons engaged in shipping on the high seas. If the injury did not result in death, a cause of action exists; the injured person might go into a court of admiralty and secure relief, but if death resulted courts applied the old common-law doctrine that the cause of action dies with the person; that is, the cause of action was personal and did not survive the injured party.

"The object of this bill is to give a cause of action in case of death resulting from negligence or wrongful act occurring on the high seas. Nearly all countries have modified the old rule which did not allow relief in the case of death under such circumstances. Under what is known as Lord Campbell's act, England many years ago authorized recovery in such cases. France, Germany, and other European countries now followed this more humane and enlightened policy and allow dependent parties to recover in case of death of their near relatives upon the high seas.

"This bill was introduced in the Senate, has been passed by that body, and is substantially in the form in which it passed this House in the Sixty-fourth Congress. In the Sixty-fifth Congress this same bill, or a very similar one, was reported from the Judiciary Committee, but did not reach consideration on the floor of the House. * * *" (Page 4482, col. 1-2)

"Mr. Mann of Illinois. Now, I do not know whether I am right or wrong about it, because I have not examined the report on this bill carefully as reported this time. But I remember this bill very distinctly in previous Congresses, and my impression, which very likely may be erroneous, is that the purpose of the bill was to confer jurisdiction in certain cases of death where no jurisdiction now exists. I was under the impression that *the bill was not intended to take away any jurisdiction which can now be exercised by any State court* * * *" (Page 4484, col. 1)

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"Mr. Mann of Illinois. We give a certain class of rights under this act. If this act as originally drawn by the admiralty lawyers was intended for the purpose of taking away jurisdiction now conferred by State statutes, it ought to be very critically examined." (Page 4484, col. 2)

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"Mr. Mann of Illinois. They would not be required to comply with the laws of a State. The gentleman's proposition [i.e., the bill *before* the Mann amendment] would take away the right of the State to apply its own laws." (Page 4484, col. 2)

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"Mr. Mann of Illinois. That is the way it will be left, *so that the act will not take away any jurisdiction conferred now by the States.*" (Page 4485, col. 1)